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MANSOR MEYON

v.

PP

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HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL APPEAL NO: 42-11-2004]
1 SEPTEMBER 2006

C ***CRIMINAL PROCEDURE:*** *Sentence - Appeal against - Concurrent or consecutive - Exercise of court's discretion - Facts and circumstances - Totality principle - Aggregate sentence - Whether manifestly excessive - Whether sentences reduced*

D The appellant herein pleaded guilty to three offences of raping his daughter. This was the appellant's appeal against the sentences of 18 years imprisonment and eight strokes of the cane for each offence, all to run consecutively. The appellant argued his own appeal and pleaded for a concurrent sentence, saying that he had two wives, six sons and three daughters. The deputy public E prosecutor merely stressed that the admitted facts of the case revealed that the appellant had raped his daughter on ten separate occasions and asked for the sentences to be affirmed.

Held:

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(1) The court below ought to have taken into account the totality of the cumulative sentences to determine whether it was justified by the criminal behaviour of the appellant as a whole *(Wong Kai Chuen Philip v. PP)* and/or take a look at the total G to see whether it was just and appropriate and if not to reduce it accordingly *(PP v. Wong Kok Sein & Ors.)* Given that the aggregate sentence was close to three times the maximum sentence for the offence and therefore far more than substantially above the normal level of sentence for the most H serious of the individual offences involved, it would not seem that the totality principle had not been offended. (para 18)

(2) The aggregate sentence was manifestly excessive. When the appellant was sentenced, he was 49, which was not I considered. 54 years imprisonment would mean that the appellant would have to live, with remission of the sentence, another 36 years in order to rejoin society. It was a most crushing sentence not in keeping with his record of, *albeit*,

what he shamefully did, that of a first offender, and of his prospects to be a free man again. It was hereby ordered that each sentence of the court below be reduced to 12 years imprisonment. (para 19)

[Order accordingly.]

Case(s) referred to:

Attorney-General v. Dominic Cheung Kai Man (Application of Review No 1 of 1987) (Unreported) ***(refd)***
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Kassim Utus v. PP [2005] 7 CLJ 273 HC ***(refd)***
Mohd Zandere Arifin v. PP [2006] 5 CLJ 663 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Shari Mohd Shariff [2005] 5 CLJ 439 HC ***(refd)***
PP v. Wong Kok Sein & Ors [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 630 HC ***(refd)***
Rex v. Leo de Cruz [1935] MLJ 1 ***(refd)***
Safae Ing lwn. PR [2006] 6 CLJ 125 HC ***(refd)***
Wong Kai Chuen Philip v. PP [1991] 1 MLJ 321 ***(refd)***

Appellant in person
For the respondent - Wirna Ripin

Reported by Suhainah Wahiduddin

JUDGMENT

Jeffrey Tan J:

[1] In the court below, the appellant pleaded guilty to the following 3 offences, all of rape of his daughter.

[2] First charge

Bahawa kamu pada Januari 1998 hingga Disember 1998 jam antara 2.30. petang hingga 11.30 malam bertempat di sebuah rumah di alamat No. 238, Lorong Sulaiman, Batu 2 3/4 Jalan Bakri di Daerah Muar di Negeri Johor, telah merogol anak perempuan kamu nama Malisa binti Mansor, KPT 851222-01-5378 yang berumur 13 tahun, dengan itu kamu telah melakukan kesalahan di bawah Seksyen 376 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[3] Second charge

> Bahawa kamu pada Januari 2001 hingga Disember 2001 jam antara 2.30. petang hingga 11.30 malam bertempat di sebuah rumah di alamat No. 238, Lorong Sulaiman, Batu 2 3/4 Jalan Bakri di Daerah Muar di Negeri Johor, telah merogol anak perempuan kamu nama Malisa binti Mansor, KPT 851222-01-5378 yang berumur 16 tahun, dengan itu kamu telah melakukan kesalahan di bawah Seksyen 376 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[4] Third charge

> Bahawa kamu pada 7 Januari 2003 jam lebih kurang 8.30 pagi antara 2.30. petang hingga 11.30 malam bertempat di sebuah rumah di alamat No. 238, Lorong Sulaiman, Batu 2 3/4 Jalan Bakri di Daerah Muar di Negeri Johor, telah merogol anak perempuan kamu nama Malisa binti Mansor, KPT 851222-01-5378 yang berumur 17 tahun 1 bulan, dengan itu kamu telah melakukan kesalahan di bawah Seksyen 376 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[5] This is the appellant's appeal against the sentences of 18 years imprisonment and 8 strokes of the cane for each offence, all to run consecutively, that the court below handed down on 4 March 2004.

[6] The appellant argued his own appeal. He pleaded for a concurrent sentence. He said he was 51 years old, had 2 wives, sons and 3 daughters. Nothing more was said by the appellant. The learned Deputy Public Prosecutor, Wirna bte Ripin, merely stressed that the admitted facts of the case revealed that the appellant had raped his daughter on 10 separate occasions. She asked for the sentences to be affirmed.

[7] On the matter of whether sentences should be ordered to run concurrently or consecutively, the Court of Appeal per Augustine Paul JCA, as he then was, in *Bachik bin Abdul Rahman v. Public Prosecutor* [2004] 2 CLJ 572, explained that the court would be guided by the one transaction rule and the totality principle:

> The combined effect of s. 282 and s. 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v. Public Prosecutor* [1990] 1 MLJ 88). The exercise of the discretion to determine the date of commencement of the sentence of

imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v. Saleem* [1964] Crim LR 482; *R v. Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v. PP* [1979] 2 MLJ 88; *Amrita Lal Hazra v. Emperor* 42 Cal 957; *Chin Choy v. PP* [1955] MLJ 236). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v. PP* [1992] 1 SLR 81 at p 83:

> The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v. Faulkner* [1972] 56 Cr App R 594, *R v. Wheatley* [1983] 5 Cr App R (S) 417 and *R v. Skinner* [1986] 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentence may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

In explaining the totality principle his Lordship referred (at p 85) to the view of DA Thomas in *Principles of Sentencing* (2nd edn) at pp 57-58:

> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender a 'crushing sentence' not in keeping with his record and prospects.

In this regard reference is also made to *Emmins on Sentencing* (2nd edn), p 151:

> It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.

There will be cases properly described as crushing the hope in the offender of reformation and a return to a desirable life but in which the offender has, by his criminal acts, forfeited any right to have his sentence reduced on that account (see *Crowley and Garner v. R* [1991] 55 A Crim R 201). As O'Bryan J said in *Vitos v. R.* [1981] 4 A Crim R 238 at p 301:

> I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour.

Yong CJ said in that case that the question of whether the sentence imposed is crushing cannot be answered mathematically by reference to the offender's age and the length of sentence to be served by the circumstances of the case.

> ... In my judgment, the sentences passed must truly reflect the fact that in this case the appellant had committed three distinct offences of incest.

[8] In the instant case, there were undoubtedly three distinct and separate offences. The sentences must reflect that fact. "If the offences are distinct and separate it will normally be the duty of the judge to pass consecutive sentences, even if the seriousness of the individual offences means that the total sentence will be more than could have been passed in respect of any one of them – the totality principle requires the court in the last instance to take a look at the total and to see whether, in the circumstances, it is just and appropriate and if not to reduce it accordingly" (*PP v. Wong Kok Sein & Ors* [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 630, quoting from the Hong Kong case of *Attorney-General v. Dominic Cheung Kai Man* Application of Review No 1 of 1987).

[9] Consecutive sentences were unquestionably warranted in the instant case. Nevertheless, "it is an established principle of sentencing that where consecutive sentences are passed against an offender, the sentence must take into account the totality of the cumulative sentences to determine whether it is justified by the criminal behaviour of the offender in the case as a whole" (*Wong Kai Chuen Philip v. PP* [1991] 1 MLJ 321 per Chan Sek Keong J, as he then was). And so it was that the totality principle was applied in favour of the subject in the following two cases.

[10] In *Kassim bin Utus v. PP* [2005] 7 CLJ 273, the learned DPP applied to the court to revise the learned magistrate's concurrent sentence for three distinct offences, but David Wong JC declined to impose consecutive sentences on the ground *inter alia* that consecutive sentences would add another eight years to the already lengthy term of imprisonment (39 years, which David Wong JC said was appropriate) that the subject would have to undergo.

[11] In *PP v. Shari bin Mohd Shariff* [2005] 5 CLJ 439, one of the issues was whether the sentence of 12 years imprisonment for each offence of rape should run concurrently (so ordered by the sessions court) or consecutively. Low Hop Bing J, as he then was, first enumerated the 8 principles governing concurrent and consecutive sentences as stated in *Bachik Abdul Rahman v. PP*, and then added that there are two further principles:

> To the above principles, the following may be added:
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> (9) The question whether the sentences should run consecutively or concurrently must depend upon the particular circumstances of the case: *Sou Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134, per Lee Hun Hoe CJ (Borneo) (as he then was) whose judgment was read by Suffian LP (as he then was);
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> (10) The totality principle requires the court to consider whether the aggregate is just and appropriate and to ensure that the sentence is not excessive: *R v. Faulkner* [1972] 56 Cr App R 594; *Public Prosecutor v. Teoh Heng Chye* [1989] 3 MLJ 205; *Public Prosecutor v. Chot Saik Kam* [1991] 1 MLJ 193; *Marimuthu Balakrisnan v. Public Prosecutor* [1974] 2 MLJ 145.

[12] Then reverting to the appeal before him, His Lordship held that consecutive sentences would offend the totality principle "in that the total sentence ... would extend to 24 years ie four years more than the statutory maximum ..."

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> 25 Reverting to the facts before the trial judge and now before me in this appeal, I am of the view that the trial judge has correctly exercised his discretion by applying the totality principle and also by referring to all the established judicial principles. He has taken into account all the relevant facts and circumstances and has correctly analysed the one transaction principle and the totality principle, after which he has applied the totality principle. In my view he has not occasioned any misdirection in the exercise of his discretion when he ordered the sentences of 12 years imprisonment to run concurrently, as consecutive sentences would have offended the totality principle in that the total sentence to be served would extend to 24 years ie four years in excess of the statutory maximum under s. 376 of the Penal Code, as the two offences were committed within two months at the same place on the same complainant under the same section.

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[13] In contrast, in *Safae Ing lwn. PR* [2006] 6 CLJ 125, where the appellant had been sentenced to two consecutive sentences of 20 years imprisonment and 8 strokes of the cane for 2 distinct offences of rape of his daughter, Ahmad Maarop J held that public interest should override the crushing effect of the consecutive sentence, and in *Mohd Zandere bin Arifin v. PP* [2006] 5 CLJ 663, where the appellant had been sentenced to 3 consecutive sentences of 18 years imprisonment and 3 strokes of the cane for 3 distinct offences of incest, Ahmad Maarop J held (see 696) that "the guilty plea ... as well as all other aspects ... in mitigation were considered by the learned sessions court judge in assessing the sentences ... (and that) the learned sessions court had not erred in principle in imposing the sentences he did on the appellant."

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[14] But in the instant case, it could not be said that the court below had not erred in principle. Granted, the plea of guilt, the personal factors, the gravity of the offences, and the public interest in particular were all taken in account. In point of fact, the court below justifiably held that the conduct of the appellant was inhuman and given to uncontrollable lust – "Ini menunjukkan sifat tertuduh yang tidak berperikemanusiaan dan hanya mengikut nafsu yang tidak terkawal". There could be no question about it that a deterrent sentence for each individual offence was called for. And given that the offences were distinct, consecutive sentences were entirely in order. Still, it did not add up that the totality principle could therefore be disregarded.

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[15] But not a word was said or recorded by the court below to indicate that it had taken a look at the total term of imprisonment to see whether it was just and appropriate. The only comment of the court below on the actual sentence was in the penultimate paragraph of its grounds of judgment, which reads as follows:

> Mahkamah menjatuhkan hukuman penjara selama 18 tahun bagi setiap pertuduhan memandangkan kesalahan yang dilakukan berlainan masa dan tempat tetapi terhadap mangsa yang sama. Mahkamah percaya mangsa tidak akan dapat melupakan peristiwa hitam ini sepanjang hayat beliau. Selain daripada itu hukuman rotan sebanyak 8 kali sebatan rotan iaitu berjumlah 24 sebatan bagi setiap pertuduhan dikenalkan sebagai hukuman mencegah tertuduh daripada melakukan dan sebagai hukuman kepada kesalahan yang beliau lakukan.

[16] There was no mention of the totality principle. There was also no direction, at least not in the grounds of judgment that the sentences shall take consecutive effect. There was however such a direction. In the notes of proceedings it was recorded (see p. 8 of the appeal record) that the sentences shall take consecutive effect. But that was all that was recorded in the notes of proceedings on the sentences. Suffice it to say that there was not a word in the grounds of judgment or in the notes of proceedings to indicate that the court below had considered the totality principle.

[17] "In regard to appeals against sentence, it has been laid down that the court will not interfere with the sentence, unless the judge has proceeded on wrong principles or given undue weight to some of the evidence" (*Rex v. Leo de Cruz* [1935] MLJ 1 per Huggard CJ). "The High Court sitting in exercise of its (appellate) powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence, having regard to all the facts disclosed on the record or that the lower court clearly has erred in applying the correct principles in the assessment of the sentence passed" (*Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 per Hasim Yeop A Sani J).

[18] The individual sentence was not excessive. But the court below ought to have taken into account the totality of the cumulative sentences to determine whether it was justified by the criminal behaviour of the appellant as a whole (see *Wong Kai Chuen Philip v. PP*) and or take a look at the total to see whether it was just and appropriate and if not to reduce it accordingly (see *PP v. Wong Kok Sein & Ors*). As said, "a cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentence for the most serious of the individual offences involved, or ..." (DA Thomas in *Principles of Sentencing, supra*). Now given that the aggregate sentence was close to 3 times the maximum sentence for the offence and therefore far more than substantially above the normal level of sentence for the most serious of the individual offences involved, it would not seem that the totality principle had not been offended.

[19] In any case, it must be said that the aggregate sentence was manifestly excessive. Yes, the appellant deserved no sympathy. But the appellant, when he was sentenced, was 49, which was not considered. 54 years imprisonment would mean that the appellant would have to live, with remission of the sentence, another 36 years in order to rejoin society. It was, to say the least, a most crushing sentence not in keeping with his record of *albeit* what he shamefully did, that of a first offender, and of his prospects to be a free man again.

[20] For the above reasons, it is hereby ordered that each sentence of the court below be reduced to 12 years imprisonment.